Dear Reviewing Officer

Michael Bamford hereby submits this timely request to intervene into the American Whitewater, et alia, (Paddler) appeal, dated October 19, 2009, of the following three recent decisions:

- Decision Notice and Finding of No Significant Impact for Amendment #22 to the Nantahala and Pisgah National Forests Land and Resource Management Plan. Managing Recreation Uses on the Upper Chattooga River. USDA Forest Service. Nantahala and Pisgah National Forests. August 2009. File Code 1900. Deciding Officer: Marisue Hilliard.
- Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan. Managing Recreation Uses on the Upper Chattooga River. USDA Forest Service. Sumter National Forests. August 2009. File Code 1900. Deciding Officer: Monica J. Schwalbach.
- Decision Notice and Finding of No Significant Impact for Amendment #1 to the Chattahoochee-Oconee National Forests Revised Land and Resource Management Plan. Managing Recreation Uses on the Upper Chattooga River. USDA Forest Service. Chattahoochee-Oconee National Forests. August 2009. File Code 1900. Deciding Officer: George Bain.

Please accept this timely request to intervene, dated October 29, 2009, submitted electronically to the reviewing officer at (*appeals-southern-regional-office@fs.fed.us*.), and to the Appellants[1]. Since AW's appeal includes reference to their restraining order and preliminary injunction, I have included my brief comments regarding this topic with this request (see below).

I also reserve the right to file additional comments to the paddler appeal for 30 days following acknowledgement of the intervention request. Please also include me in all correspondence, meetings and discussions between appellants and the USFS.

Sincerely,

Michael Bamford

Michael Bamford
PO 2725
Cashiers, NC 28717

[1] AW- Mark Singleton, Director mark@americanwhitewater.org . ACA -Executive Director **Martin A. Bartels** mbartels@americancanoe.org , President: Atlanta Whitewater Club, Amanda Gettler. amanda.gettler@gmail.com, Principle: Western Carolina Paddlers. Chris Bell. chris.bell@boatingbeta.com Executive: GA Paddle Club Tom Bishop. http://www.gapaddle.com/executive-committee/12-contacts/4-tom-bishop.html

Paddlers Permanent Injunction and Restraining Order Filing are both Reckless and contemptuous toward the Federal Court.

1) During the kayakers 2006 lawsuit against the USFS, the court offered a detailed explanation of what does not represents ***irreparable harm*** [2] Judge O'Kelly Dismissal Order (attached) ruled that…

"[W]hile the Headwaters is currently closed to floating, abundant opportunities to float on the Chattooga remain; over 60% of the river, approximately 36 miles, remains open to floaters."[3]

The 2006 Dismissal order was clear that any claims of '*hardship*' for not floating the headwaters ware unfounded, based in part on the abundant opportunities already available along the lower Chattooga. Kayaker's repeated claims of "irreparable harm" because some restrictions are placed on paddlers are misleading, since the court has already ruled on the claim of hardship.

The paddling appellants have completely disregarded the courts detailed explanation within the previous ruling. The kayak lobby is repeating the same arguments, using the same cast, on the same issue, but presenting them in a different Federal Court, as if no ruling was previously published. Both the Kayakers and the USFS are bound by this court ruling, which includes consideration of boating opportunities below highway 28 when evaluating available recreation capacity.

The Paddler Appeal contemptuously ignores the court ruling and misleadingly claims that *"Only the remote twenty -one river miles of the Chattooga WSR upstream of South Carolina Highway 28 are at issue in this case. That twenty-one-mile section is referred to herein as the 'upper Chattooga' or 'Headwaters'*." [Id at 6]

Oddly the kayak lobby also filed a declaration from Glenn Haas, which agrees with the courts. Page 4 of the Hass declaration is embedded below.

> 1. The EA in question only addresses recreation management for the upper 21-mile portion of the Chattooga Wild and Scenic River, without due consideration for the lower 36-mile river segment below Highway 28. Yet the resources, resources uses and ORVs in one segment affect, and are affected by, those in other segments. Certainly visitor capacity decisions in one segment can significantly affect visitor capacity decisions in other segments in order to respond fairly and equitably to diverse public demands and values. Partitioning of the Chattooga Wild and Scenic River for the purpose of revising the recreation management direction for only 21-mile portion is not justifiable and compromises the benefit of full, integrated and comprehensive planning.

Placating individual whimsy is not a Forest Planning mandate; any plan must consider the impact to the social and biological environment, within the entire management area, prior to establishing a recreational policy. The court (along with the expert declaration), include the lower Chattooga paddling opportunities as relevant to any discussion of the Chattooga above highway 28. Both parties

[2] Pg 16-18, Dismissal Order, 2006, AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006
[3] Pg 17-18, Dismissal Order, 2006, AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

from the 2006 AW lawsuit are now legally bound by that court decision, and that decision is now time barred. It is time the USFS and the paddlers recognize the Chattooga below highway 28.

2) The paddler appeal challenges the August 26, 2009 decisions, but again gripes about the previous policies supposed "harm" to the appellants. First, since the agency has not yet finalized the 2009 plan, any claim associated with that decision is premature. Also, the paddlers are bound by the previous 2006 ruling, which ruled that the appellants are not harmed by past agency decisions, like the 1985 forest plan, nor by any new decisions that does not grant kayakers access to the entire river .

Even if the judiciary negates the 2009 plan, based on the paddler appeal claims, this does not automatically grant kayakers unlimited access to areas that have been legally closed for 35 years. As detailed in Judge O'Kelly's Dismissal Order, a negated plan would only force the agency to adopt a temporary plan until a new plan was completed. The only plan that does not require a NEPA review, would be the continuation of the 1985 plan, which limited boating to below highway 28.

However, the stubborn kayak lobby is again contemptuously ignoring that the previous management plans are not an issue, even though the courts concluded that the previous management plan is legal and properly promulgated.[4] In Judge O'Kelly's 2006 dismissal order, he clearly noted:

"A challenge to the 1985 plan would be barred by the statute of limitations. See 28 U.S.C. § 2401 (containing six year limitations period for actions against the United States)."[5]

The paddlers have not pursued an appeal of this 2006 decision; it is now a final udicial decision.

Again, the filings of the paddlers appear deliberate and wasteful, with complete contempt for the 2006 court decision that was a result of their own action and lawsuit. The validity of the 1985 plan has already been judicially ruled upon at great expense to the taxpayers, the judiciary, and Forest Service resources.

3) The Paddler Appeal falsely claims that the regional Forest Service decision *"is a final agency action subject to review by the courts.."* (id pg 4 Paddler Appeal). Similar misleading claims are made within the paddlers recent SC filings.[6] What constitutes a "final agency" action was explained during the paddler's previous court appearance in 2006, therefore these claims could not have been made out of pure ignorance. The paddler claims are deliberately misleading and contemptuous for two reasons. First, the 2009 Sumter FONSI highlighted

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[4] Pg 7,Dismissal Order, 2006, AW v. USFS, Case 2:06-cv-00074-WCO notes *"The prohibition, as it has been for over twenty years, is a product of and traceable to the properly promulgated 1985 plan."*
The USFS also filed a detailed explanation on page 2-4 of Doc. 11 filed 07/07/0 [2:06-cv-00074-WCO]

[5] Pg 8, , Dismissal Order, 2006, AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

[6] Page 2 of AW's *Motion For Temporary Restraining Order And Preliminary Injunction,* civil action 8:09-cv-02665-RBH

the appeal process, in which all the paddlers are now currently engaged. Secondly, the steps associated with a "final" agency action were clarified in such great detail during the paddlers 2006 federal court appearance on this exact issue. Both are outlined below.

a) Depicted below is an excerpt from the last page of the August 2009 Sumter FONSI.

> For this decision, the two other Responsible Officials and I have decided to use the "Optional Appeal Procedures Available during the Planning Rule Transition Period". Appeals must be postmarked or received within 45 days after the date the legal notice of this decision is published in the newspaper of record (*The State*). Appeals must be filed with the Regional Forester for the Southern Region at: USDA Forest Service, Attn: Appeal Reviewing Officer, 1720 Peachtree Road, NW, Suite 811N, Atlanta, GA 30309-9102. Appeals may also be faxed to (404) 347-5401 or mailed electronically in a common digital format to *appeals-southern-regional-office@fs.fed.us*. Hand-delivered appeals must be received within normal business hours of 7:30 a.m. to 4:00 p.m., Monday-Friday, closed on federal holidays.

The recent decision outlines the appeal process as part of the ongoing agency action; it outlines how the public can participate. Paddlers subsequently filed an appeal as part of this ongoing agency action, which proves conclusively that the kayak lobbyists are well aware that the agency action is not yet finalized or ripe for judiciary review. Obviously, Paddlers are aware of the ongoing agency process in which they are currently engaged as appellants and interveners.

Any TRO granted that is based on misleading and erroneous inforamtion presented in the filings, expose all parties involved with this lawsuit liable of perjury.

b) What constitutes a "final agency" action was explained in great detail during the Kayak lobby's previous lawsuit against the USFS in 2006.[7] The discussion was not in general terms, but rather in specific terms of the currently active agency process that kayakers are prematurely attempting to usurp. The hearing transcript (attached) details the USFS internal appeal process. The first step is the local Forest Decision, which was recently published. After which, initiates the public appeal process, than a Regional Forest Decision, than possibly the Secretary of Agriculture review, if necessary. The premature kayakers are once again hastily filing lawsuits, which derails the ongoing NEPA process that provides the general public (not just the kayakers) and opportunity to appeal decisions prior to finalizing a Forest Plan. Pages 21-24 of the hearing transcript are attached within the document for your review.

[7] Page 21-24 of the *Motion to Dismiss* Transcript

THE COURT: ALL RIGHT. LET ME ASK YOU A QUESTION HERE AGAIN PROCEDURALLY SO THAT I FULLY UNDERSTAND IT. THIS GOES BACK TO SOME OF THE QUESTIONS I WAS ASKING YOU EARLIER TRYING TO DETERMINE EXACTLY WHERE THE DECISION LIES IN THIS CASE. WE HAVE -- I'VE FORGOTTEN THE NAME OF THE PERSON NOW, BUT WHOEVER IT WAS THAT ENTERED THIS ORDER ON BEHALF OF THE REGIONAL FORESTER, IT'S --

MR. MCCLAIN: GLORIA MANNING.

THE COURT: IT WAS A FEMALE NAME, I'VE FORGOTTEN WHAT IT WAS.

MR. MCCLAIN: IT'S GLORIA MANNING.

UNITED STATES DISTRICT COURT

WHATEVER HER NAME WAS.

MR. MCCLAIN: YES, BECAUSE SHE WAS ACTING FOR THE REGIONAL FORESTER, SO AT SOME POINT THAT BECAME THE DECISION OF DALE BOSWORTH --

THE COURT: ALL RIGHT. HER DECISION BECAME THE DECISION OF THE FOREST SERVICE.

MR. MCCLAIN: CORRECT.

THE COURT: OKAY. NOT THE REGIONAL, BUT THE WAY I READ IT IT WAS JUST A REGIONAL LEVEL. MAYBE I MISREAD IT.

MR. MCCLAIN: NO, I THINK THAT'S RIGHT. BUT I THINK IT, YOU KNOW, EFFECTIVELY BECOMES THE POSITION OF THE FOREST SERVICE IF HE DOESN'T INTERVENE AND OVERTURN IT IN 30 OR 45 DAYS.

THE COURT: AND THAT'S WHAT HAPPENED.

MR. MCCLAIN: AND THAT'S WHAT HAPPENED.

THE COURT: SHE ENTERED THE WHATEVER IT WAS SHE ENTERED THAT DISAGREED WITH THE PLAN THAT HAD BEEN SUBMITTED.

MR. MCCLAIN: RIGHT.

THE COURT: SHE SET IT ASIDE OR WHATEVER.

MR. MCCLAIN: AND THEN THERE IS SOME TALK ABOUT WHETHER THEY COULD HAVE REVIEWED -- DISCRETIONARY REVIEW BEFORE THE SECRETARY, AND THERE IS SOME DISPUTE EVEN WITHIN THE PEOPLE OF THE AGENCY THAT I'VE TALKED TO ABOUT WHETHER THAT WAS PERMITTED OR POSSIBLE, AND I BELIEVE THE PLAINTIFFS CONSIDERED DOING THAT AND DIDN'T DO THAT FOR WHATEVER REASON, BUT WE HAVEN'T WAIVED AN EXHAUSTION DEFENSE. BUT AT THIS POINT THE FEELING IN THE AGENCY

WITH THE PEOPLE I HAVE TALKED TO IS THAT THEY HAVE, IN FACT, EXHAUSTED WHATEVER --

THE COURT: I'M ASKING THOSE QUESTIONS BOTH IN REGARD TO THE CURRENT SITUATION AND WHAT THE SITUATION WOULD BE.

MR. MCCLAIN: RIGHT.

THE COURT: AFTER THE STUDY.

MR. MCCLAIN: RIGHT.

THE COURT: IN OTHER WORDS, AFTER THE STUDY IS DONE IT HAS TO GO BACK TO GLORIA --

MR. MCCLAIN: GLORIA MANNING.

THE COURT: MANNING, AND THEN I PRESUME FROM THERE TO BOSWORTH.

MR. MCCLAIN: RIGHT.

THE COURT: THE FORESTRY SERVICE, AND I ASSUME FROM THERE TO THE SECRETARY OF THE AGRICULTURE.

MR. MCCLAIN: THAT'S RIGHT. I THINK WE'LL BE IN THE SAME POSITION -- THE REGIONAL FORESTER WILL ISSUE A NEW DECISION JUST AS HE SIGNED OFF ON THE 2004 PLAN, THAT GLORIA MANNING CAN THEN -- THE REGIONAL FORESTER THROUGH GLORIA MANNING CAN THEN REVIEW THAT NEW DECISION AND DECIDE WHETHER THERE IS NOW EVIDENCE IN THE RECORD TO SUPPORT THE PROHIBITION OR -- THERE MAY NOT BE ANY CHALLENGE TO IT AT THAT POINT. HE MAY ISSUE A NEW DECISION THAT SAYS AMERICAN WHITEWATER WILL FLOAT OR FLOAT WITH WHATEVER REGULATION THAT THEY ARE HAPPY WITH. BUT I THINK -- YEAH, WE'LL BE BACK IN THE SAME POSITION WITH THE REGIONAL -- THERE WILL BE A

NEW PLAN ISSUED, NEW DECISION, THAT CAN THEN BE REVIEWED THROUGH ADMINISTRATIVE PROCESS, AND WE CAN BE BACK HERE.

THE COURT: IT WON'T BE FINAL UNTIL THE SECRETARY OF AGRICULTURE SIGNS OFF OF IT; IS THAT CORRECT?

MR. MCCLAIN: I THINK EITHER SIGNS OFF ON IT OR DOESN'T ACT.

THE COURT: OR DOESN'T ACT WITHIN A GIVEN PERIOD OF TIME.

MR. MCCLAIN: RIGHT. RIGHT.

THE COURT: WHICHEVER, IS TANTAMOUNT TO SIGNING OFF ON IT, THEN.

MR. MCCLAIN: RIGHT. RIGHT.

THE COURT: OKAY.

In addition to the above MTD hearing discussion, the Dismissal Order offered the courts perspective about filing lawsuits prior to a final agency decision. The court noted…

"The court can think of no greater waste of time and effort than to proceed to consider the merits of this action, have the parties and the court expend hours upon hours preparing, arguing, and deciding the case, only to enter an order that will expire, at best, months later."[8] [no additional emphasis was required]

Normally when the kayak lobby claims ignorance, they can be very convincing. However, claiming ignorance to what constitutes a "final agency decision," that was previously expounded upon, during the Paddlers previous lawsuit, appears deliberate, contemptuous and wasteful, not just mindless.

[8] Pg 14, AW v. USFS, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

4) Finally, the paddler TRO motion recklessly demands unrestricted year-round access to popular swimming areas located near access points on the Chattooga. One of particular concern is Cashiers' Sliding rock pictured here. The kayak lobby filed in SC court demanding these swim areas (that were not even included within the assessment) be forced open to fleets of kayakers with complete disregard for all other visitors. Misleadingly, the appellants present downriver data (that they claim is flawed because these visitors were not studied) as justification for opening the entire Chattooga headwaters region to unlimited kayaker access. Repeatedly the self-serving kayaker lobby focuses complete attention on themselves and not on what impact paddle-sport may have to the many other Chattooga visitors. The only forgone opportunities for boaters is having to initiate a float trip a few miles down the same river to enjoy unlimited kayaking below highway 28, or these boaters can jump in for a swim at these areas like every other citizen can.

These pictures provide sufficient explanation as to why year-round unlimited boating would be inappropriate for this portion of the Wild and Scenic Chattooga and that the paddler demands for a judicial relief are self-serving and completely **reckless.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN WHITEWATER, AMERICAN CANOE ASSOCIATION, GEORGIA CANOEING ASSOCIATION, ATLANTA WHITEWATER CLUB, WESTERN CAROLINA PADDLER, FOOTHILLS PADDLING CLUB, JOSEPH C. STUBBS, KEN STRICKLAND, and BRUCE HARE,	:	
Plaintiffs,	:	
vs.	:	CIVIL ACTION NO. 2:06-CV-74-WCO
DALE BOSWORTH, in his official capacity as Chief of the United States Forest Service, UNITED STATES FOREST SERVICE, MIKE JOHANNS, in his official capacity as Secretary of the United States Department of Agriculture, and UNITED STATES DEPARTMENT OF AGRICULTURE,	:	
Defendants.	:	

ORDER

The captioned case is before the court for consideration of defendants' motion to dismiss [8-1] plaintiffs' complaint.

I. Factual Background

This action involves a challenge to the United States Forest Service's ("the Forest Service") allegedly unlawful closure of the upper twenty-one miles of the Chattooga

River ("the Headwaters") to recreational floaters.[1] Plaintiffs American Whitewater, American Canoe Association, Georgia Canoeing Association, Atlanta Whitewater Club, Western Carolina Paddler, and Foothills Paddling Club are nonprofit associations devoted to, in part, the enjoyment and preservation of the nation's rivers. Plaintiffs Joseph C. Stubbs, Ken Strickland, and Bruce Hare are individual members of plaintiff American Whitewater who, but for the allegedly unlawful closure, would float the Headwaters. The defendants in this action are the agencies and agents responsible for the boating ban.

In January 2004, defendants published the Revised Land and Resource Management Plan for Sumter National Forest ("the 2004 plan"),[2] which renewed a floating prohibition on the Headwaters.[3] Though the Forest Service considered management alternatives that would have allowed floating the Headwaters, the Regional

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[1] The court uses the terms "floating" and "boating"interchangeably throughout this order to refer to primitive paddling. Similarly, it uses "floaters" and "boaters" interchangeably to refer to those who participate in primitive paddling.

[2] The Land and Resource Management Plan for Sumter National Forest was adopted in 1985. The National Forest Management Act directs the Secretary of Agriculture to "develop, maintain, and as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). The management plan is a programmatic framework for management of Sumter National Forest that "guide[s] all natural resource management activities and set[s] management standards for the Sumter National Forest for the next 10 to 15 years." The 2004 plan challenged by plaintiffs was, as its title indicates, a revised management plan drafted to replace the existing 1985 plan.

[3] After Congress designated the Chattooga River a Wild and Scenic River on May 10, 1974, the Forest Service published the Chattooga Classification, Boundaries and Development Plan ("the 1976 plan"). The 1976 plan, the first plan under which the Chattooga River was managed, prohibited floating the Headwaters. Every management plan since the 1976 plan has renewed the ban, and its attempted renewal in the 2004 plan led to this lawsuit.

Forester concluded that opening the Headwaters would result in unacceptable impacts on social and physical resources and that the outstanding recreational values of the river would be protected and enhanced by continuing the floating ban. Therefore, he renewed the ban as part of the 2004 plan. On April 15, 2004, plaintiff American Whitewater administratively appealed that portion of the 2004 plan, contending that the ban's renewal was not supported by adequate data or studies in the administrative record. The Forest Service favorably decided the appeal on April 28, 2005, when Gloria Manning, in her capacity as Reviewing Officer for the Chief of the Forest Service ("the Reviewing Officer"), issued an order ("the 2005 order") that provided:

> The Sumter National Forest [Revised Land and Resource Management Plan] record, however, is deficient in substantiating the need to continue the ban on boating to protect recreation as an [outstanding remarkable value] or to protect the wilderness resource. No capacity analysis is provided to support restrictions or a ban on recreation use or any type of recreation user. While there are multiple references in the record to resource impacts and decreasing solitude, these concerns apply to all users and do not provide the basis for excluding boaters without any limits on other users.
>
> . . . .
>
> After careful review of the record, . . . , I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.

The 2005 order then directs "the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use, and to adjust or amend, as

appropriate the [2004 plan] to reflect a new decision based on the findings." The Reviewing Officer estimated the ordered visitor use capacity analysis would take two years to complete.

The 2005 order also contemplates interim management of the Chattooga River, which would last until the Regional Forester could amend the 2004 plan in light of the visitor use capacity analysis findings. During the interim period, the order directs that "[m]anagement of boating above Highway 28 will revert to the direction in the 1985 Forest Plan, and the closure decision made in that plan will remain in effect." Thus, until an adjusted or amended revised plan is published, management of the Headwaters remains governed by the 1985 plan, the plan immediately preceding the deficient 2004 plan.

Despite the favorable nature of the Reviewing Officer's order, plaintiffs filed the instant action on May 18, 2006, nearly a year later. Notably, plaintiffs do not challenge the findings of the 2005 order, the ordered analysis, or the agency's issuing an amended 2004 plan; they challenge only the Reviewing Officer's decision to revert to the 1985 plan for interim management of the Headwaters and ask the court to open the Headwaters until the agency issues its amended 2004 plan. Plaintiffs argue that the Reviewing Officer's interim management decision is arbitrary and capricious because it directly conflicts with her conclusion that the ban's renewal in the 2004 plan is

unsupported by adequate data or studies.[4] In response to the complaint, defendants filed a motion to dismiss, arguing (1) that plaintiffs lack standing because their alleged injury is neither traceable to the challenged 2005 order nor likely to be redressed by invalidation of that order and (2) that any dispute between the parties is not yet ripe for judicial review.

II. Discussion

Generally, a reviewing court must give due deference to the expertise of an agency, and agency decisions are not disturbed unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Before even considering that standard in this case, however, the court must resolve threshold justiciability issues, namely whether plaintiffs have standing to challenge the agency action and, if so, whether the dispute is sufficiently ripe for judicial resolution.

A. Standing

Standing is "an essential and unchanging part of the case-or-controversy requirement" of Article III. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490,

[4] To be clear, the Reviewing Officer concluded that the ban included in the 2004 plan was not supported by an adequate record. The Reviewing Officer did not, and had no reason to, address the validity of the ban included in the 1985 plan. See 2005 Order at 6 ("The Sumter National Forest RLRMP record, however, is deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource.").

498 (1975). To establish standing, a plaintiff seeking to invoke the federal court's jurisdiction must satisfy three constitutional elements:

> (1) [that] it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Koziara v. Casselberry, 392 F.3d 1302, 1304-05 (11th Cir. 2004) (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000)). "All three elements are an 'irreducible constitutional minimum,' and failure to show any one results in a failure to show standing." Id. at 1305 (quoting Lujan, 504 U.S. at 560). In the motion before the court, defendants argue that plaintiffs fail to satisfy the second and third requirements—that their injury is not fairly traceable to the agency's challenged decision and that their injury is not likely to be redressed by a favorable decision from this court.[5]

With regard to traceability, defendants argue that plaintiffs' alleged injury–their inability to float–is traceable to the preexisting 1985 plan, not the 2005 order, and point out that plaintiffs have not challenged the 1985 plan. Plaintiffs claim, however, that their injury is traceable to the 2005 order because but for the Reviewing Officer's

[5] Defendants have not challenged plaintiffs' allegation of an injury-in-fact, and the court finds plaintiffs' allegation sufficient to satisfy the first prong of the standing analysis. See Lujan, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'") (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990)). Unfortunately, the remaining two prongs are not as easily resolved.

decision to reinstate the 1985 plan in her 2005 order, no authority would exist for the boating ban.[6] Alternatively, plaintiffs argued at the hearing held on this motion that they had in fact challenged the 1985 plan in the present action. The court disagrees with plaintiffs on both accounts.

First, the court finds that plaintiffs' injury is not traceable to the challenged 2005 order. Contrary to plaintiffs' claims, the challenged 2005 order does not ban boating; it merely provides that the existing 1985 plan would continue to govern in place of the deficient 2004 plan. See 2005 Order at 6 ("Management of boating above Highway 28 will revert to the direction in the 1985 Forest Plan, and the closure decision *made in that plan* ***will remain*** in effect.") (emphasis added). The prohibition, as it has been for over twenty years, is a product of and traceable to the properly promulgated 1985 plan. The fact that the Reviewing Officer set aside, at plaintiffs' request, a portion of the plan drafted to replace the 1985 plan does not somehow lead to the conclusion that the Reviewing Officer's 2005 order caused plaintiffs' injury. If plaintiffs want to attack the floating ban, they must challenge the management plan that provides the current

[6] Specifically, plaintiffs argue that "when the 2005 Order invalidated the 2004 Plan, the 2005 Order became the current – and only – agency authority for managing hand-powered boating on the Headwaters." (Pls. Resp. to Defs.' Mot. to Dismiss 16). They argue that the government erroneously assumes"that the 1985 Plan's existence continued *de facto* despite being superceded by the 2004 Plan." The court does not agree that the 2004 plan necessarily superceded the 1985 plan. Had the 2004 plan been approved by the Reviewing Officer or gone unchallenged by plaintiffs, then the court would have no difficulty in concluding that the 2004 plan replaced the 1985 plan in its entirety. But that situation is not the one the court faces. Here, plaintiffs have gone to great lengths to expose the deficiencies of the 2004 plan, and it seems inconsistent for them to now argue that the same deficient and allegedly illegal plan they challenged replaced and wholly superceded a valid and existing management plan.

authority for the ban, i.e., the 1985 plan; they cannot do so by challenging the favorable 2005 order.

Second, despite their suggestion at oral argument, plaintiffs have not challenged the 1985 plan. The arguments in plaintiffs' brief frame the nature and scope of their challenge[7] and specifically state at one point that plaintiffs' "injuries derive not from the 1985 plan but from the 2005 Order." (Pls.' Resp. to Defs.' Mot. to Dismiss 16). Given plaintiffs' own characterization of their argument, the court has little trouble concluding that they have not challenged the validity of the 1985 plan.[8] And because plaintiffs have chosen to challenge only the 2005 order, not the actual source of their harm, they fail to satisfy the second prong of the standing test.

The court also finds that plaintiffs lack standing because it is not likely a favorable decision by this court will redress their injury. In light of the court's conclusion that plaintiffs' injury derives from the 1985 plan, not the 2005 order, setting aside the 2005 order as plaintiffs request will not redress their injury. Plaintiffs' injury exists independently of the 2005 order, and regardless of whether that order is in place, they remain unable to float the Headwaters because of the governing 1985 plan.

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[7] For example, plaintiffs state that this case "presents a single, straightforward issue: Is the 2005 Order inconsistent with its own findings and rationale?" (Pls.' Resp. to Defs.' Mot. to Dismiss 6). They also claim that the 2005 order, not the 1985 plan, deprives them of their right to enjoy hand-powered boating on the Headwaters. (Pls.' Resp. to Defs.' Mot. to Dismiss 4).

[8] It is not surprising that plaintiffs frame their challenge as one to the 2005 order, not the 1985 plan. A challenge to the 1985 plan would be barred by the statute of limitations. See 28 U.S.C. § 2401 (containing six year limitations period for actions against the United States).

Accordingly, plaintiffs have failed to show that a favorable decision is likely to redress their injury.[9]

Moreover, plaintiffs' suggestion that, in addition to setting aside the challenged portion of the 2005 order, the court could redress plaintiffs' injury by ordering the Forest Service to allow floating on the Headwaters is unpersuasive. Though the court's declaration would certainly redress plaintiffs' injury, the court is not convinced such an order would be proper and, therefore, that relief is not likely. For good reason, rivers that are part of the national forest system are managed by the Forest Service, and the court is in no position to fashion even an interim management plan for the Headwaters. Had the Reviewing Officer, in her order reversing the challenged portion of the 2004 plan, fashioned the interim relief suggested by plaintiffs, other aggrieved parties could rightfully claim that her failure to revert to the immediately preceding plan violated the laws governing the establishment and implementation of forest plans. Similarly, if this court were to pronounce the Headwaters open, it not only would undermine these same laws but also would frustrate ongoing agency efforts to resolve this dispute.

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[9] The court notes that its redressability concerns exist even if it is mistaken about the source of plaintiffs' injury. If plaintiffs' injury *can* be traced to the 2005 order, the fact remains that any favorable decision–short of entering an order opening the Headwaters without any expert agency or public comment–would ineffectively redress their injury. For example, if the court sets aside the 2005 order, effectively setting aside, too, the 1985 plan, a prudent option would be to call upon the agency to develop an interim management plan. The Forest Service, however, is already involved in a comparable task: in light of a defective 2004 plan, the agency is developing an amended plan. There is no indication that the Forest Service could develop an interim management plan any faster than it can develop the amended 2004 plan called for by the 2005 order. In fact, opening the Headwaters by court order is the only relief that would redress plaintiffs' injury, but absent circumstances not presented here, the court is simply going to be unwilling to impose its will in place of a valid management plan.

The court thus finds two independent bases for concluding plaintiffs lack standing. Plaintiffs failed to show their injury is fairly traceable to the challenged agency action and that a favorable decision by this court is likely to redress their injury. Either of these findings, and certainly both, prevent plaintiffs from meeting Article III's irreducible constitutional minimum. Koziara, 392 F.3d at 1305. However, even if plaintiffs had standing,"prudential concerns 'counsel judicial restraint'" and make review inappropriate at this time. Nat'l Advertising Co. v. City of Miami, 402 F.3d 1335, 1339 (11th Cir. 2005).

B. Ripeness

The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Reno v. Catholic Social Services, Inc., 509 U.S. 43, 57 n. 18 (1993). The court's inquiry is simple; it "focuses on whether the claim presented is 'of sufficient concreteness to evidence a ripeness for review'" and asks "whether it is appropriate for this case to be litigated in a federal court by these parties *at this time*." Nat'l Advertising Co., 402 F.3d at 1339 (quoting Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 759-760 (11th Cir. 1991). "Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes." Id. The doctrine also serves to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect

the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

In deciding whether a dispute is sufficiently ripe, the court must determine "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." Nat'l Advertising Co., 402 F.3d at 1339. In considering these two factors, the Supreme Court has explained that courts should consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). Common sense guides the court's analysis. McCoy-Elkhorn v. U.S. EPA, 622 F.2d 260, 263 (6th Cir. 1980) ("Ripeness calls for a common sense judgment on the fitness of the issues for judicial review and the actual hardship to the parties if a court decision were withheld."). Taken together, these considerations foreclose review in the present case.

As a general rule, "a case is fit for judicial decision where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." West Virginia Highlands Conservancy, Inc. v. Babbitt, 161 F.3d 797, 800 (4th Cir. 1998). Here, the parties disagree about the finality of the challenged decision, and they thus disagree about the fitness of the issues for judicial resolution. Defendants

point out that the agency has not yet made a final decision regarding whether floating on the Headwaters will be prohibited by the amended 2004 plan and argue that any decision prior to that ultimate one should not be considered final agency action. For their part, plaintiffs argue that the 2005 order definitively fixes their rights with regard to the same interim period, and, therefore, it is final at least in that regard. That the 2005 order setting aside the challenged portion of the 2004 plan represents final agency action is indisputable; the order, itself, states as much.[10]

Despite the order's last sentence, the court agrees with defendants on this issue. While the order setting aside the 2004 plan constitutes final agency action, the decision to *temporarily* revert to the 1985 plan while an amended plan is developed is just that, temporary. Moreover, it is a temporary solution brought about by plaintiffs' own challenge of the 2004 plan. Though parties should be encouraged to aggressively pursue the appeal of deficient plans, they should not be heard to complain where, because of their success, the agency temporarily reverts to an existing management plan while it works to correct the inadequacies of its new plan. The agency's consideration of this issue is ongoing, and likely within a year of this court's order, the Forest Service will have completed its study and adjusted the revised plan accordingly. Whether that amended plan renews or lifts the floating ban, the question of floating on the Headwaters

[10] The final sentence of the order reads: "This decision is the final administrative determination of the Department of Agriculture unless the Secretary, on his own initiative, elects to review the decision within 15 days of receipt."

will be definitively resolved by final agency action and subject to judicial review at that more appropriate time.

Guided by common sense and prudential concerns, the court is convinced this case is not fit for judicial review at *this time*, even if the challenged decision constitutes final agency action. See State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986) ("[E]ven where agency action is final and the issues presented are purely legal, a court may nonetheless properly deem a matter unfit for resolution if postponing review would provide for a more efficient examination and disposition of the issues."). This is so because the requirement of finality "is predicated upon the perception that litigants as a group are best served by a system which prohibits piecemeal . . . consideration of rulings that may fade into insignificance by the time the initial decisionmaker disassociates itself from the matter." West Virginia Highlands, 161 F.3d at 800 (quoting Aluminum Co. of America v. United States, 790 F.2d 938, 942 (D.C. Cir. 1986) (Scalia, J.)). Here, the court believes both its decision and the challenged agency decision will "fade into insignificance" shortly and that review, therefore, is imprudent at this time.

Only the interim floating ban is challenged in this lawsuit. Whatever shape the court's decision on the merits would take, it would likely carry force only for a few months. Unlike situations where future legislative or agency action in an area is probable, agency action here is ongoing, and an amended revised management plan will be issued shortly. By the time the proceedings in this court are complete and the losing

party has sought and received appellate review, the court's decision will be a mere afterthought because the Forest Service's amended 2004 plan for the Headwaters will have superseded the court's order and rendered it obsolete. The court can think of no greater waste of time and effort than to proceed to consider the merits of this action, have the parties and the court expend hours upon hours preparing, arguing, and deciding the case, only to enter an order that will expire, at best, months later. Given this reality, deciding the case at this time simply does not represent a wise investment of judicial resources.

Apart from the almost certain insignificance of an order entered by this court, the fitness factors articulated in Ohio Forestry—whether judicial intervention would interfere with future agency action and whether the court would benefit from further factual development—also support finding plaintiffs' claim unfit. As to the first factor, the court finds judicial intervention would interfere with further administrative action and thereby "hinder agency efforts to revise its policies . . . through revision of the Plan." Ohio Forestry, 523 U.S. at 735. Though plaintiffs argue that the Forest Service will take no further action with regard to the discrete period they challenge and that, therefore, interference is a nonissue, their argument overlooks the practical effects judicial intervention would have on the Forest Service's ongoing attempt to resolve this issue.

Agency efforts to issue an amended 2004 plan are already underway, and judicial intervention would frustrate, if not prevent, the Forest Service's completing this task.

Simply having to litigate this action diverts personnel away from the study, and the court's opening the Headwaters to unanticipated users would certainly substantially interfere with the agency's ability to conduct its visitor use capacity analysis.[11] Also, disrupting the Forest Service's efforts would be costly. Plaintiffs waited over a year before filing this lawsuit, and during that time, defendants spent several hundreds of thousands of dollars in contracting fees, developed plans, held public meetings, researched data collection methods, identified techniques for collecting data, and recently completed a visitor capacity analysis plan for collecting social data and a general work plan for collecting biophysical data. To a large degree, the product of these costly efforts would be lost if the Headwaters were opened mid-study. The court thus agrees with defendants that judicial intervention at this time would inappropriately interfere with ongoing agency efforts to amend its revised management plan, causing the agency, but ultimately United States taxpayers, substantial harm.

The court would also benefit from further factual development. Though plaintiffs present to the court a "discrete legal question," this fact does not preclude the court from concluding that further factual development would aid judicial resolution of plaintiffs' claim. See, e.g., Nat'l Park Hospitality, 538 U.S. at 812 ("Although the question presented here is 'a purely legal one' and § 51.3 constitutes 'final agency action' within the meaning of § 10 of the APA, we nevertheless believe that further factual

[11] The court notes that interfering with the Forest Service's ability to expeditiously issue an amended 2004 plan benefits no one, including plaintiffs, whose long-term ability to float the Headwaters will be decided by the amended 2004 plan, not by any decision of this court.

development 'would significantly advance our ability to deal with the legal issues presented.'") (internal citations omitted). Here, the ongoing study may reveal that opening the Headwaters to floaters will substantially interfere with other recreational uses or that the Headwaters pose too great a risk to inexperienced floaters to open. Inasmuch as plaintiffs ask the court to make a decision that effectively opens or closes the Headwaters until a new management plan is in place, the court would certainly benefit from knowing whether the historical dangers of an open Headwaters, such as river fatalities and user conflicts, still exist before reopening it.

Finally, in deciding whether a claim is ripe, the court also asks whether delayed review would cause hardship to the parties.[12] Hardship exists where an action "results in 'adverse effects of a strictly legal kind.'" Pittman, 267 F.3d at 1280 (quoting Ohio Forestry, 523 U.S. at 733). The Supreme Court has explained that such effects are not present if the challenged policies "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." Ohio Forestry, 523 U.S. at 733. In this case,

[12] Having found the fitness factor weighs heavily in favor of delaying judicial review, the court notes that no amount of hardship may justify review. Though some commentators "state that ripeness may be found if either fitness or hardship is shown, the Supreme Court's decisions 'seem to indicate that both requirements must be met.'" Pittman v. Cole, 267 F.3d 1269, 1280 n. 8 (11th Cir. 2001) (quoting Erwin Chemerinsky, Federal Jurisdiction § 2.4.3 (3d ed. 1999)). In Pittman, the Eleventh Circuit did not definitely resolve the complex issue of whether both elements must be met or, alternatively, whether "a sliding scale approach should be applied such that some prematurity can be excused if more hardship is shown." Id. This court need not attempt to resolve this difficult question either; even if "some prematurity can be excused if more hardship is shown," plaintiffs have made an insufficient showing of hardship to warrant immediate judicial review.

plaintiffs argue that it is "abundantly clear" that the 2005 order causes them hardship because it commands them to refrain from floating on the Headwaters and withholds from them a legal license to enjoy floating on the Headwaters.

Borrowing from the court's earlier standing discussion, the court finds that the 2005 order does not command plaintiffs to refrain from floating or withhold from them a legal license to float. Rather, plaintiffs' injury–thus any hardship–derives from the 1985 plan. That unchallenged plan undoubtedly commands plaintiffs to refrain from boating the Headwaters and withholds from them a legal license to do so, but the 2005 order does not. Therefore, the court finds that plaintiffs suffer no hardship from the court's withholding consideration of the agency's challenged decision because no hardship could possibly flow from delayed review of an order that, itself, did not create the injury plaintiffs hope to remedy.[13]

Even if the 2005 order "results in 'adverse effects of a strictly legal kind," additional circumstances present in this case offset the conclusion that delayed review would result in hardship. Significantly, the Forest Service's amended 2004 plan is forthcoming, and any hardship imposed by the 2005 order will be endured for just a short time longer. Further, while the Headwaters is currently closed to floating,

[13] The court is simply unconvinced that the 2005 order imposes a hardship. Plaintiffs are indisputably in a better position now than they were before the agency action they challenge. Specifically, plaintiffs have succeeded in having the 2004 plan set aside and, despite having missed their opportunity to challenge the validity of the 1985 plan, find themselves in the enviable position of (a) having the Forest Service lift the floating ban in light of the findings of the ongoing study in the amended plan, or (b) having an opportunity, with the benefit of a fully developed administrative record, to challenge the agency's decision to keep the ban in place at the study's conclusion.

abundant opportunities to float on the Chattooga remain; over 60% of the river, approximately 36 miles, remains open to floaters. Additionally, the 2005 order contemplates the possibility of user trials in conjunction with the capacity analysis and orders the Regional Forester to involve affected and interested parties in the design and execution of the capacity analysis. Plaintiffs continue to engage the agency and participate in the agency's decisionmaking process; they are not being shut out of the agency's consideration of this issue. Last, if plaintiffs find the amended 2004 plan unacceptable, they can challenge that plan, and if judicial review is needed, it will be available and thankfully devoid of the hovering difficulties and uncertainties present in this action. These possibilities, coupled with the considerations previously discussed, preclude a finding of hardship in this matter.

III. Conclusion

The court concludes that plaintiffs lack standing to challenge defendants' 2005 order because plaintiffs' claimed injury is traceable to the 1985 plan and not a product of the challenged 2005 order. Further, plaintiffs' injury is not likely to be redressed by a favorable decision from the court. Even if the court were to set aside the 2005 order as plaintiffs request, the 1985 plan, which also includes a floating ban, would continue to provide management direction for the Headwaters. But even if plaintiffs could establish standing, the court concludes that prudential concerns weigh heavily against reviewing the merits of this action at this time. Most importantly, plaintiffs challenge the legality of an action set to expire in fall 2007; the Forest Service's adjusted or

amended management plan will render the court's decision obsolete at that time. Judicial resources should not be wasted on such fleeting relief, especially where, as here, the court has found that judicial intervention would inappropriately interfere with ongoing agency efforts, that the court would benefit from further factual development, and that plaintiffs would suffer little, if any, hardship from the delay.

Frankly, no party, including those not before the court, would be served by a "temporary" decision from this court. A floater should be able to easily determine whether he can float on a given part of the Chattooga River without worry of fine. Likewise, a fisherman should know whether he will have to cast around floaters while enjoying the quiet solitude of the Headwaters. The possibility that this court could reach a decision opening the Headwaters, thereby overriding thirty years of agency policy, only to have that decision superseded by a valid amended revised management plan less than a year later counsels in favor of judicial restraint. The law ought not be seen as so whimsical, and although there are circumstances where justice demands that a court intervene despite the real possibility of its decision being immediately overridden, those circumstances are not present here.

Plaintiffs have worked tirelessly to open the Headwaters to floaters, and they scored a major victory by successfully challenging the 2004 plan. Their vision of an open Headwaters may well be realized when the Forest Service issues its amended revised management plan, but they will have to wait until that plan is handed down to find out. In a situation like the one presented here, where the high costs, risks, and

uncertainties associated with judicial review significantly outweigh the harm of delaying it, plaintiffs must be content to allow the process they have started to play out. If their vision does not materialize, they can be assured that the courts will be open and willing to review their complaints at that time.

Accordingly, the court **GRANTS** defendants' motion to dismiss.

IT IS SO ORDERED, this 6th day of October, 2006.

s/*William C. O'Kelley*
WILLIAM C. O'KELLEY
Senior United States District Judge